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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 920. 572 274

EDWARD LELOUP, PLAINTIFF IN ERROR,

vs.

THE PORT OF MOBILE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

FILED AUGUST 25, 1885.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 920.

EDWARD LELOUP, PLAINTIFF IN ERROR.

vs.

THE PORT OF MOBILE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 Supreme Court of the State of Alabama. December Term, 1884.

TUESDAY, *Dec. 2nd*, 1884.

Be it remembered that a regular term of the supreme court of the State of Alabama was begun and holden according to law at the capitol, in the city of Montgomery, on Tuesday, the second day of December, A. D. eighteen hundred and eighty-four, it being the first Tuesday of the said month.

Present and presiding as justices of said court: Hon. George W. Stone, chief justice; Hon. Henderson M. Somerville, associate justice; Hon. David Clopton, associate justice.

Transcript of the record and proceedings had in the circuit court of Mobile county, State of Alabama, in a certain cause lately pending therein, in which The Port of Mobile was plaintiff and Edward Leloup, agent of the Western Union Telegraph Company, was defendant; which case was determined in said
2 circuit court at the fall term, 1884, thereof, and appealed to the April term, 1885, of the supreme court of the State of Alabama.

Complaint.

Circuit Court of Mobile County, Alabama. Fall Term, 1883.

THE PORT OF MOBILE, Pl'ff,
vs.
EDWARD LELOUP, Agent Western Union Tel. Co., Def'd't.

The plaintiff, which is a municipal corporation chartered by and existing under the laws of the State of Alabama, claims of the defendant the sum of five dollars as a penalty for the violation of an ordinance of said municipal corporation adopted and in force on and before the 28th day of August, A. D. 1883; which said ordinance is as follows, to wit:

Be it ordained by the Mobile police board—

"That the licence tax for the year from the 15th of March, 1883, to the 15th of March, 1884, be, and the same is hereby, fixed as follows:

* * * * * * * *

"On telegraph companies, $225.00."

Be it further ordained: For each and every violation of the aforesaid ordinance the person convicted thereof shall be fined by the recorder not less than one nor more than fifty dollars.

And the plaintiff avers that heretofore, to wit, on the 28th
3 day of August, 1883, the defendant, Edward Leloup, being the managing agent of the Western Union Telegraph Company, a corporation having its place of business in the said port of Mobile, and then and there engaged in the business and occupation of transmitting telegrams from and to points within the State of Alabama and between the private individuals of the State of Alabama, as well as between citizens of said State and citizens of other

States, committed a breach of said ordinance by neglecting and refusing to pay said license to the said municipal corporation, the said Port of Mobile.

And plaintiff further avers that for the breach of said ordinance by the defendant as aforesaid the recorder of the said Port of Mobile afterwards, to wit, on the 29th day of August, 1883, duly and lawfully imposed on said defendant a fine of five dollars, whereby said defendant became and is liable to pay to the plaintiff the said sum of five dollars.

BRAXTON BRAGG,
P'f's Att'y.

Filed in office December 5th, 1883.

R. E. JONES, *Clerk.*

Demurrers to Complaint.

4 Circuit Court, Mobile County.

THE PORT OF MOBILE *vs.* EDWARD LELOUP, Ag't.

Now comes the defendant, by his attorney, and demurs to the complaint, and for causes of demurrers show:

1st. That the said cause of action being founded on a penalty and fine imposed by the recorder if the plaintiff fails to show the existence of any valid ordinance or law authorizing the imposition of any such fine or penalty.

2nd. Said complaint, seeking to recover a penalty for an alleged breach of an ordinance, fails to show the existence of any such valid ordinance and such breach thereof as would entitle the plaintiff to recover.

CLARK & CLARK,
Att'ys for Def'd't.

Filed in office January 7th, 1884.

R. E. JONES, *Clerk.*

Pleas.

Circuit Court, Mobile County. Fall Term, 1883.

THE PORT OF MOBILE
vs.
EDWARD LELOUP, Agent Western Union Tel. Co.

Without waiver to his demurrer to the complaint.

Now comes the defendant, and for answer to said complaint pleads in short by consent:

5 First. The general issue.

Second. And for further plea to said complaint defendant says *actio non*, because he says that he was, at the time of the alleged breach of said alleged ordinance, the duly-appointed manager at the Port of Mobile of the Western Union *Union* Telegraph Company. That said Western Union Telegraph Company, the employer of this de-

fendant, was, prior to the fifth day of June, 1867, a telegraph company duly incorporated and organized under the laws of the State of New York, and by its charter authorized to construct, maintain, and operate lines of telegraph in and between the various States of the Union, including the State of Alabama. That on said fifth day of June, 1867, the said telegraph company duly filed its written acceptance with the Postmaster General of the United States of the restrictions and obligations of an act of Congress entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military, and other purposes," approved July 24th, 1866. That in accordance with the authority of its said charter and the said act of Congress, and by agreement with the railroad companies, the said Telegraph Company constructed its lines, and was, at the time of the said alleged breach of said ordinance, maintain-g and operating said
6 lines of telegraph on the various public railroads leading into or through the said Port of Mobile, to wit, The Mobile and Ohio railroad, a railroad extending from the said Port of Mobile, in Alabama, through the States of Mississippi, Tennessee, and Kentucky, to Cairo, in the State of Illinois; The Louisville and Nashville railroad, extending from Cincinnati, in the State of Ohio, through said Port of Mobile to New Orleans, in the State of Louisiana, with a branch extending from said State of Alabama over the Pensacola and Louisville railroad to Pensacola, in the State of Florida. That the said telegraph lines so running into or through said Port of Mobile connected with and extended beyond the termini of the said railroads over other railroads, making continuous lines of telegraph from the office of said company, in said Port of Mobile, to, through, and over all of the principal railroads, post roads, and military roads in and of the United States, and having offices for the transaction of telegraph business in the departments at Washington, in the District of Columbia, and in all of the principal cities, towns, and villages in each of the United States and in the Territories thereof. That all of said railroads so leading into and through the said Port of Mobile and elsewhere in the United States are public highways, and that the daily mails of the United States are regularly carried thereon, under authority of law and the direction of the
7 Postmaster General, and that said railroads and each of them are post roads of the United States. That said telegraph lines are also constructed under and across the navigable streams of the United States, in the State of Alabama and in the other States of the Union, but in all cases said lines are so constructed and maintained as not to obstruct the navigation of such streams and the ordinary travel on such military and post roads. That the said Telegraph Company was, before and during said year, commencing March 15th, 1883, and now is, engaged in the business of sending and receiving telegrams over said lines for the public between its said office in the Port of Mobile and other places in other States and Territories of the United States, and to and from foreign countries; also in sending telegraphic communications between the several departments of the Government of the United States and

their officers and agents, giving priority to said official telegraphic communications over all other business. And defendant avers that said official telegrams have been and are sent at rates which have been fixed by the Postmaster General annually since the said 5th of June, 1867. And defendant avers that as the manager of said company and in its name and under its direction and appointment and in no other manner or capacity was he engaged in said telegraph business at the time and the manner as alleged in
8 said complaint.

Wherefore he prays judgment, &c.

GAYLORD B. CLARK,
Att'y for Def't.

Filed in office January 7th, 1884.

R. E. JONES, *Clerk.*

Demurrers.

Circuit Court of Mobile County. Fall Term, 1883.

THE PORT OF MOBILE
vs.
EDWARD LELOUP, Agent of Western Union Telegraph Co.

Comes the plaintiff and demurs to the second plea of defendant and for cause of demurrer says:

1. That the matters set forth in said plea show no ground of exemption from the license tax on the occupation and business of the said corporation.

2. That the complaint shows that the corporation—the Western Union Telegraph Company—is engaged in the general business of transmitting telegrams from and to points within the State of Alabama and between the private individuals of the State of Alabama, as well as between citizens of said State and citizens of other States, and that the license tax is on such general business and occupation.

3. That there is no averment in said plea that the license tax imposed on the business of said corporation is unreasonable or excessive or partial or beyond the usual and ordinary exercise of the
9 police power of the municipal corporation of the Port of Mobile.

4. That the provisions of the act of Congress of July 24th, 1866, referred to in said plea, are insufficient to exempt the said corporation from the usual and ordinary license tax on its business and occupation in the Port of Mobile.

5. That said plea does not show any attempt on the part of the municipal corporation, the plaintiff, to interfere with the foreign or interstate business of the said Telegraph Company.

BRAXTON BRAGG,
Att'y for Pl'ff.

Filed in office January 7th, 1884.

R. E. JONES, *Clerk.*

Ruling on Demurrers. Demurrers to Complaint Overruled.

Circuit Court.

JANUARY 14TH, 1884.

THE STATE OF ALABAMA, *Mobile County:*

THE PORT OF MOBILE
vs.
EDWARD LELOUP, Agent of Western Union Telegraph Co.

This day came the plaintiff and defendants, by their attorneys, and this cause coming on to be heard on the defendants' demurrers to the complaint, it is considered and adjudged by the court that the same be overruled.

10 *Judgment, &c.*

Circuit Court.

JANUARY 26TH, 1885.

THE STATE OF ALABAMA, *Mobile County:*

THE PORT OF MOBILE
vs.
EDWARD LELOUP, Agent of Western Union Telegraph Co.

Def'd't withdraws his 1st plea and the cause is submitted on the demurrer to the 2nd plea, which plea is sustained, and def'd't declining to plead over, judg't *nil dicit* is rendered for the pl'ff. Verdict for $5.00

Now come the parties, by their attorneys, and the defendant withdraws his first plea. Thereupon the said cause coming on to be heard on the demurrers of the plaintiff to the second plea of defendant, it is ordered and adjudged by the court that the said demurrers be, and the same are hereby, sustained.

Thereupon the defendant declines to plead further, and saying nothing, it is considered by the court that the plaintiff do have and recover of the defendant damages to be assessed by a jury.

Thereupon came a jury of good and lawful men, to wit, Charles W. Gelbke and eleven others, who, being duly empannelled and sworn well and truly to assess the damages sustained by the plaintiff herein, upon their oaths do say: "We, the jury, assess the damages of plaintiff at five dollars."

11 Wherefore it is considered by the court that the plaintiff have and recover of the defendant the said sum of five dollars, together with the costs in this behalf expended, for which let execution issue.

Prayer for Appeal.

Circuit Court of Mobile County.

THE PORT OF MOBILE
vs.
EDWARD LELOUP, Agent Western Union Telegraph Co.

Now comes the defendant, Edward Leloup, and prays an appeal to the present term of the supreme court of Alabama, returnable first Monday in April next.

GAYLORD B. CLARK,
Att'y for Def't.

Filed in office January 26th, 1885.

R. E. JONES, *Clerk.*

Appeal Bond.

Circuit Court.

THE STATE OF ALABAMA, *Mobile County:*

Know all men by these presents that we, The Western Union Telegraph Company, C. G. Meriwether, and Gaylard B. Clark, are held and firmly bound unto the Port of Mobile, its president, heirs, executors, or administrators, in the sum of one hundred dollars, for the payment of which we jointly and severally bind our-
12 selves, our heirs, executors, or administrators, firmly by these presents.

Sealed with our seals and dated this the eighteenth day of February, 1885.

The condition of the above obligation is such that whereas the above-bound Western Union Telegraph Company has this day applied for and obtained an appeal, returnable *to* the first Tuesday of April, 1885, of the December term, 1884, of the supreme court of Alabama, to supersede and reverse a judgment recovered by the said Port of Mobile against the said Western Union Telegraph Company, at the fall term, 1884, of the circuit court for Mobile county, for five dollars, besides costs:

Now, if the said Western Union Telegraph Company shall prosecute to effect its said suit in the supreme court of the said State of Alabama, and shall pay and satisfy such judgment as the supreme court shall render in the premises, then this obligation to be null and void; otherwise, to be and remain in full force and effect.

WESTERN UNION TELEGRAPH COMPANY, [SEAL.]
By C. G. MERIWETHER, *Dist. Supt.*
C. G. MERIWETHER. [SEAL.]
GAYLARD B. CLARK. [SEAL.]

Filed in office January 18th, 1885.

R. E. JONES, *Clerk.*

13 *Citation in Appeal.*

Circuit Court.

THE STATE OF ALABAMA, *Mobile County:*

To the Sheriff of Mobile county, Greeting:

Whereas at a term of the circuit court of Mobile county, for Mobile county, held on the eleventh Monday after the fourth Monday in September, 1884, in a certain cause in said court, wherein the Port of Mobile was plaintiff, and Edward Leloup, as agent of the Western Union Telegraph Company, was defendant, a judgment was rendered against said defendant, to recover which judgment the said Western Union Telegraph Company has on this day applied for and obtained from this office an appeal returnable to the supreme court of the State of Alabama, to be held at Montgomery on the first Tuesday of April next, and the necessary bond having been given by the said Western Union Telegraph Company with C. G. Meriwether and Gaylord B. Clark, sureties:

Now, you are hereby commanded, without delay, to cite the said Port of Mobile, or Braxton Bragg, Esq., its attorney, to appear at the next term of our said supreme court, to defend against the said appeal, if they think proper.

Witness Richard E. Jones, clerk of the circuit court of said county, this 18th day of February, A. D. 1885.

14 Attest: R. E. JONES, *Clerk.*

Sheriff's Return.

Received Feb. 18th, 1885, and on the same day I served a copy of the within citation in appeal on Braxton Bragg, Esq.

WM. J. BRAINARD,
Sh'ff, M. C.
By W. A. BOSS, *D. S.*

Certificate of Appeal.

THE STATE OF ALABAMA, *Mobile County,* } *ss:*

I, Richard E. Jones, clerk of the circuit court of Mobile county, State of Alabama, do hereby certify that the foregoing ten pages, numbered from 1 to 10, both inclusive, contain a full, true, correct, and complete transcript of the record and proceedings had in said circuit court in a certain cause lately pending therein, in which the Port of Mobile was plaintiff, and Edward Leloup, agent of the Western Union Telegraph Company, was defendant, which case was determined in said court at the fall term, 1884, thereof.

And I further certify that on the 18th day of February, 1885, the said defendant took an appeal from the judgment therein rendered in said case to the April term, 1885, of the supreme court of the State of Alabama.

15 In witness whereof I have hereunto set my hand and af-

fixed the seal of said circuit court of Mobile county, at Mobile, Alabama, on this the 6th day of March, A. D. 1885.

Attest: R. E. JONES, *Clerk.*

1 div., 529.
Filed April 13, 1885.

SANFORD, *Clerk.*

Supreme Court.

TUESDAY, *May* 19, 1885.

The court met pursuant to adjournment.

Present and presiding: Hon. Henderson M. Somerville, associate justice; Hon. David Clapton, associate justice.

Mobile Circuit Court.

EDWARD LELOUP, Ag't,
vs.
THE PORT OF MOBILE. } 1 Div. 529.

Come the parties, by attorneys, and submit this cause on briefs for decision.

Supreme Court.

THURSDAY, *May* 21, 1885.

The court met pursuant to adjournment.

16 Present: All the justices.

* * * * * * *

Mobile Circuit Court.

EDWARD LELOUP, Agent,
vs.
THE PORT OF MOBILE. } 1 Div. 529.

Come the parties, by attorneys, and the record and matters therein assigned for error being submitted on briefs, and duly examined and understood by the court, it is considered that in the record and proceedings of said circuit court there is no error. It is therefore considered that the judgment of said court be in all things affirmed. It is also considered that the appellant and the Western Union Telegraph Company, C. G. Meriwether, and Gaylord B. Clark, sureties on the appeal bond, pay the amount of the judgment of said circuit court and ten per cent. damages, and interest thereon, and the cost of appeal in this court and in the circuit court.

MAY 21, 1885.

Affirmed on authority of Port of Mobile *vs.* Edward Leloup in manuscript. The opinion in that case is made the opinion in this.

Per curiam.

17 *Appeal from Mobile Circuit Court.*

Supreme Court. Dec. Term, 1884.

THE PORT OF MOBILE
vs.
EDWARD LELOUP. } 1 Div. 487.

STONE, *C. J.:*

The act to incorporate the Port of Mobile, approved Feb. 11th, 1879, (pamph. acts 392, 409,) confers authority on the city government to levy and collect a license tax "from all persons or corporations trading or carrying on any business, trade, or profession, by an agent or otherwise, within the limits of said corporation." The Mobile police board by an ordinance ordained "that the license tax from the 15th of March, 1883, to the 15th of March, 1884, be, and the same is hereby, fixed as follows: * * * On telegraph companies, $225." The Western Union Telegraph Company, a corporation chartered without the State, had an office in the Port of Mobile of which appellee was the chief manager. At that office the company received and transmitted messages from and to points both without and within the State of Alabama. It had complied with the requirements of the act of Congress. Revised Statutes, §§ 5263, *et seq.*

The telegraph company, through its agent, the appellee,
18 refused to take out or pay for the license aforesaid, and continued to do business without such license. A penalty was assessed against the agent for a violation of the ordinance and this suit was brought for its recovery. The defence was that the ordinance is an attempt to regulate commerce and violative of the clause of the Constitution of the United States which confers on Congress the "power to regulate commerce with foreign nations and among the several States." The circuit court held the defence good and gave judgment against the Port of Mobile.

Is the ordinance a violation of the Constitution of the United States? We will not gainsay that this license tax was imposed as a revenue measure—as a means of taxing the business, and thus compelling it to aid in supporting the city government. That no revenue for State or municipal purposes can be derived from the agencies or instrumentalities of commerce, no one will contend. The question generally mooted is, How shall this end be attained? In the light of the many adjudications on the subject, the ablest jurists will admit that the line which separates the power from its abuse is sometimes very difficult to trace. No possible good could come of any attempt to collate, explain, and harmonize them. We will not attempt it. We confess ourselves unable to draw a distinction
19 between this case and the principle involved in Osborne *vs.* Mobile, 16 Wall., 479. In that case the license levy was upheld, and we think it should be in this. Joseph *vs.* Randolph, 71 Ala., 499.

The rulings of the circuit court were not in harmony with these views.

Reversed and remanded.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the supreme court of Alabama, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Edward Leloup against the Port of Mobile, wherein was drawn in question the validity of the statute of or an authority exercised under the United States, and the decision was against their validity, and wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution or laws of the United States, and the decision was in favor of such, their validity; and wherein was drawn in question the construction of a clause of the Consti-
20 tution or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution and statute, a manifest error hath happened to the great damage of the said Edward Leloup, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison *P.* Waite, Chief Justice of the said Supreme Court, the 28th of May, in the year of our Lord one thousand eight hundred and eighty-five.

J. W. DIMMICK,

21 *Clerk of the Circuit Court of the United States for the Middle District of Alabama.*

Allowed by Geo. W. Stone, Chief Justice Supreme Court of Alabama, May 28, 1885.

The Supreme Court of Alabama.

Know all men by these presents: That we, Edward Leloup, C. G. Meriwether, and Gaylard B. Clark, are held and firmly bound unto The Port of Mobile in the full and just sum of five hundred dol-

lars, to be paid to the said Port of Mobile or its certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-sixth day of May, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas lately at a regular term of said court, in a suit depending in said court between Edward Leloup and The Port of Mobile, a judgment was rendered against the said Edward Leloup, and the said Edward Leloup having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the
22 said Port of Mobile citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Edward Leloup shall prosecute his writ of error to effect and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

EDWARD LELOUP, [SEAL.]
By GAYLARD B. CLARK, *Att'y.* [SEAL.]
C. G. MERIWETHER. [SEAL.]
GAYLARD B. CLARK. [SEAL.]

Sealed and delivered in presence of—
Witness: P. McGAULY.

Approved May 28, 1885, by—

GEO. W. STONE,
Chief Justice Supreme Court of Alabama.

The above bond is sufficient.

BRAXTON BRAGG,
Att'y Port of Mobile.

Citation.

The United States of America to the Port of Mobile, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington
23 on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the middle district of Alabama, wherein Edward Leloup is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the honorable George W. Stone, chief justice supreme

court of Alabama, this 28th day of May, in the year of our Lord one thousand eight hundred and eighty-five.

GEO. W. STONE.

On this —— day of ——, in the year of our Lord one thousand eight hundred and eighty-five, personally appeared ——, the subscriber, ——, and makes oath that he delivered a true copy of the within citation to ——.

—— ——.

I acknowledge service of the above citation on writ of error sued out for the supreme court of Alabama.

May 29, 1885. BRAXTON BRAGG,
Att'y for Port of Mobile.

24 THE STATE OF ALABAMA, *Montgomery County:*

I, John W. A. Sanford, clerk of the supreme court of the State of Alabama, do hereby certify that the foregoing pages, numbered from 1 to 23, inclusive, contain a full, true, and correct copy of the record and proceedings of the said supreme court in the cause lately pending in said court, wherein Edward Leloup, Agent of the Western Union Telegraph Company, was appellant, and the Port of Mobile was appellee, and that the writ of error hereunto attached is the original writ issued, allowed, and filed in the office of the clerk of said supreme court, and that the citation hereto attached was issued, and return of said citation filed in said office of the clerk of said supreme court.

In witness whereof I have hereunto set my hand and affixed the seal of said supreme court, at the capitol in the city of Montgomery, on the 14th day of August, A. D. eighteen hundred and eighty-five.

[Seal of the Supreme Court of Alabama.]

JOHN W. A. SANFORD,
Clerk of the Supreme Court of the State of Alabama.

25 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the supreme court of Alabama, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Edward Leloup against the Port of Mobile, wherein was drawn in question the validity of the statute of, or an authority exercised under, the United States, and the decision was against their validity, and wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision was in favor of such, their validity; and wherein was drawn in question the construction of a clause of the

Constitution, or statute of, or commission held under, the
26 United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution and statute, a manifest error hath happened to the great damage of the said Edward Leloup, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done thereon to correct that error, what of right and according
27 to the laws and custom of the United States should be done.

Witness the honorable Morrison *P.* Waite, Chief Justice of the said Supreme Court, the 28th of May, in the year of our Lord one thousand eight hundred and eighty-five.

[Seal of the United States Circuit Court, Middle District of Alabama.]

J. W. DIMMICK,
Clerk of the Circuit Court of the United States
for the Middle District of Alabama.

Allowed by Geo. W. Stone, Chief Justice Supreme Court of Alabama, May 28, 1885.

[Endorsed:] Writ of error. Port of Mobile.

28 *Original of Citation.*

The United States of America to the Port of Mobile, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the middle district of Alabama, wherein Edward Leloup is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable George W. Stone, chief justice supreme court of Alabama, this 28th day of May, in the year of our Lord one thousand eight hundred and eighty-five.

GEO. W. STONE.

On this —— day of ——, in the year of our Lord one thou-
29 sand eight hundred and eighty-five, personally appeared ——, before me, the subscriber, —— and makes oath that he delivered a true copy of the within citation to ——.

—— ——.

I acknowledge service of the above citation on writ of error sued out to the supreme court of Alabama.

May 29th, '85.

BRAXTON BRAGG,
Att'y for Port of Mobile.

[Endorsed:] Citation. (Original.) Ed. Laluup *vs.* Port of Mobile.

Endorsed on cover: Alabama supreme court. No. 920. Edward Leloup, plaintiff in error, *vs.* The Port of Mobile. Filed August 25th, 1885.

27-640.

Office Supreme Court U. S.
FILED.
APR 26 1888
JAMES H. McKENNEY.
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1887.

No. 274.

EDWARD LELOUP, PLAINTIFF IN ERROR,

VS.

THE PORT OF MOBILE, DEFENDANT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

Brief of GAYLORD B. CLARK for Plaintiff in Error.

Supreme Court of the United States,

OCTOBER TERM, 1887.

No. 274.

EDWARD LELOUP, PLAINTIFF IN ERROR,

VS.

THE PORT OF MOBILE, DEFENDANT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

Brief of GAYLORD B. CLARK for Plaintiff in Error.

STATEMENT OF THE CASE.

Prior to the 15th of March, 1883, the defendant in error by its governing body the Mobile Police Board, and pursuant to the powers conferred by its charter, adopted an ordinance exacting a license tax from all Telegraph Companies of $225 for the year commencing March 15, 1883, with a penalty for its violation.

The Western Union Telegraph Company failed to take out such license or to pay the said license fee. Thereupon, on the 28th of August, 1883, Edward Leloup, the managing agent of said Telegraph Company was arrested and fined by the Recorder of Mobile for a violation of said ordinance, in that he had done the business of said Western Union Telegraph Company without such license.

The said Leloup gave a bond and appealed from said judgment of conviction to the Circuit Court of Mobile county. Thereupon, according to the practice in such cases, the Port of Mobile, by its attorney, filed its complaint in said court for the recovery of said fine. This complaint recited the passage of the ordinance establishing the license tax in question, and the penalty imposed for doing a telegraph business without having first paid such tax. The complaint then alleged that the defendant, Edward Leloup, being the managing agent of the Western Union Telegraph Company, a corporation having its place of business in said Port of Mobile, and then and there engaged in the business and occupation of telegraphing for the public, had on a certain day committed a breach of said ordinance and that the Recorder had imposed a fine therefor on said Leloup whereby he became liable to pay the said sum, &c. (Record, p. 1.)

To this complaint the defendant demurred (Record, p. 2), which demurrer was overruled by the court (Record, p. 5.) The defendant then filed a plea of general issue (subsequently withdrawn), and a special plea (Record, p. 2) which sought to justify the refusal of the Western Union Company to pay such license as a pre-requisite to its doing a telegraph business, upon the ground that said company did business upon the post roads only of the United States, and that it had duly filed with the Postmaster General of the United States its acceptance of the act of Conpress, approved July 24, 1866, entitled "An act "to aid in the construction of telegraph lines and to secure to "the government the use of the same for postal, military, and "other purposes."

To this special plea the plaintiff below filed its demurrers (Record, p. 4).

The Circuit Court overruled these demurrers and gave judg-

ment for Leloup, but on the appeal of the Port of Mobile the said judgment was reversed by the Supreme Court of Alabama. (All papers relating to the said appeal and all judgments reversed by the said Supreme Court are omitted from this record, excepting the opinion of the Supreme Court).

The cause being remanded by the Supreme Court the demurrers of the Port of Mobile to Leloup's special plea were sustained, and final judgment *nil dicet* was entered against him for the amount of the fine. (Record, p. 5.)

From this last judgment Leloup took an appeal (Record, p. 6) which was affirmed on the authority of the opinion entered on the first appeal (Record, pp. 8 and 9), and Leloup now sues out his writ of error to the Supreme Court of the United States.

ASSIGNMENTS OF ERROR.

The Supreme Court of Alabama erred—

1. In affirming the judgment of the Circuit Court overruling the demurrers of Leloup to the complaint. (Record, pp. 2 and 5.)

2. In affirming the judgment of the lower court sustaining the demurrers of the Port of Mobile to the special plea of Leloup, and in entering final judgment against said Leloup. (Record, pp. 4, 5 and 8.)

ARGUMENT.

By the laws of Alabama in force at the time the alleged license was exacted, the said business done and the said fine imposed, the Western Union Telegraph Company was required to pay taxes to the State, County and Port of Mobile, on its poles, wires, fixtures, and other property, at the same rate and to the same extent as other corporations and individuals were required to do. Besides the tax on tangible property, they were also required to pay a tax of three-quarters of one per

cent. on the gross receipts of said company within the State as a subject of taxation. (See Post Appendix A.)

The license tax here demanded is in addition to the foregoing property and gross receipt taxes, and is what it purports to be, viz: A tax for the grant of a license to exercise the privilege of doing a telegraph business over the post roads of the United States to and from the Port of Mobile. Without the prior payment of which, if the law be valid, no license can be granted, and without which license the business cannot be lawfully conducted, and all those engaging therein, in violation of the ordinance, whether as principal or agent, would be subject to arrest, fine and imprisonment, from day to day until they be compelled to desist from such business.

It is very obvious that the license tax in question was not intended as, or a substitute for, a property tax. Nor is the license in any sense a mere police regulation with the tax as an incidental fee. It is clearly an additional tax to the others for the sole purpose of raising additional revenue. This is clearly shown, not only by the nature and amount of the tax, but such is the avowed purpose of the statute which authorizes its imposition. (Acts 1878-9, p. 392, Sec. 30, *vide* Appendix A.)

NATURE AND EFFECT OF THE TAX.

A license is defined to be a grant of permission; a power or authority given to another to do some lawful act, as to carry on certain trades, to practice a profession, etc.

2 Burrell's Law Dict., Title License.

Gibbons vs. Ogden, 9 Wheaton, 1, (213).

It is most generally a combined exercise of both the police and taxing power.

Burroughs on Taxation, Sec. 77.

When imposed under the taxing power it becomes that kind of an occupation tax more properly denominated a privilege tax; and a privilege is defined to be the exercise of an occupation or business which requires a license from some proper

authority designated by a general law, and not open to all, or to any one without a license.

Burroughs' Taxation, Sec. 77.
Cooley on Taxation, p. 385.
4 Sneed, (Tenn.) 193, (258).

In such a case where properly imposed the business carried on without a license will be illegal.

Cooley on Taxation, p. 385.
Page vs. The State, 11 Ala., 849.

In Stein vs. The Mayor of Mobile, 49 Ala., 363, it was said, (p. 369) that a license tax was in restraint of a privilege.

Mr. Justice Mathews, in speaking of the license or privilege tax, says: "The question of the right to impose a tax as a condition of the exercise of the privilege resolves itself into the broader question of the right to prohibit it altogether; for that which it may license it may forbid. Indeed, it is forbidden unless it is licensed."

Pullman Southern Car Co. vs. Nolan, Comptroller.
Same vs. Montgomery County.
State of Tenn. vs. Pullman Southern Car Co., 22 Fed. Reporter, p. 276, December 30, 1884.
See, also, License Tax Cases, 5 Wal. 462, 470.

VIOLATES THE CONSTITUTION OF THE UNITED STATES.

I contend that the license in question violates the following provisions of the Constitution of the United States, viz:

1. Article 1, Sec. 8, Par. 3, which provides that Congress has power to "regulate commerce with foreign nations and "among the several States"

2. Ibid, Par. 7: "and to establish post offices and post "roads."

3. Art. 6, Par. 2: "The Constitution of the United States "and the laws made in pursuance thereof are the supreme law "of the land."

Under the above named powers vested in Congress to regulate commerce among the several States, and to establish post offices and post roads, an act was passed on the 14th day of July, 1866, entitled "An Act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes." 14 Statutes at Large, p. 221, Revised Statutes of the U. S., Sec. 5263, etc. See Appendix W. C.

By Section 1 of said act of Congress, any telegraph company organized under the laws of any State in the Union, it is declared, "shall have the right to construct, maintain and ope-"rate lines of telegraph through and over any portion of the "public domain of the United States, and over and along any "of the military and post roads of the United States which "have been or may hereafter be declared such by an act of Con-"gress, and over, under, or across the navigable streams and "waters of the United States."

By Section 2 of said act it is declared that telegraphic communications between the several departments of the government and their officers and agents shall have priority over all other messages, and are to be sent at rates to be annually fixed by the Postmaster General.

Section 3 prohibits the transfer of the privileges in the act granted, and provides that, at any time after July 24, 1871, for postal, military, or other purposes, the government may purchase the plant of such companies, upon a valuation to be ascertained by appraisers mutually chosen.

Not only does the above mentioned act authorize telegraph companies to construct their lines on post roads, and to do a telegraphic business for the government subject to the regulations of the Postmaster General, but for the purpose of still further subjecting the said companies to domination in the matter, Congress has imposed a penalty upon such companies should they fail to perform the services for the government which they assume to perform by their acceptance of the pro-

visions of said act. Revised Statutes of the United States, Sec. 5269. (Appendix D).

By Section 3964 of Revised Statutes of the United States (see Appendix E), all railroads and parts of railroads are declared to be post roads of the United States.

On the 5th day of June, 1867, the Western Union Telegraph Company duly filed its written acceptance with the Postmaster General of the United States of the restrictions and obligations of said act of Congress. Record, p. 3.

By virtue of the said act of Congress said Western Union Telegraph Company was authorized to build and operate its lines on any of the railroads leading into or through the Port of Mobile, whose companies might acquiesce therein.

Pensacola Tel. Co. vs. W. U. Tel. Co., 96 U. S., p. 1.

To say that Telegraph Companies may construct, maintain and operate their lines on the railroads leading into Mobile is to declare that such company may carry on its business over said lines, and may receive and transmit messages therefor at Mobile or any other point or points on said lines. *This is a privilege directly conferred on such companies by act of Congress, subject only to proper police regulations in the exercise of the right.*

The record shows that the defendant was the managing agent of the Western Union Telegraph Company at Mobile, and that the business done by him was the business of said company and none other, and that the lines over which the said business was done were all of them constructed over the post

roads and navigable waters of the United States. That said lines connected with offices in the government departments at Washington, and that said company was engaged in the business of transmitting messages for the government under the terms fixed by the Postmaster General, and according to the restrictions and directions of the act of Congress. In addition, said company was engaged in the business of sending commercial messages between the States, and to and between Mobile and other points in the State of Alabama, as well for private individuals as for government officers. (Record, pp. 2, 3, 4.)

Conceding in the argument that the Port of Mobile was authorized by the *terms* of its charter to exact a license tax from Telegraph Companies, and that it regularly adopted an ordinance to put its said powers into effect, we contend that the exaction of such license from said manager or company, as a prerequisite to the lawful exercise of its privilege of doing said telegraph business in the Port of Mobile, is illegal, and cannot be enforced, whether it be claimed as an exercise of the taxing or police power of the State.

It may be there is nothing in the Constitution of the United States which, in the *ordinary cases* of corporations, although engaged in inter-state commerce, conflicts with the State's right of taxing such corporations on both, their property and their gross receipts having a situs within its limits, and at the same time exacting a license tax as a prerequisite to the lawful carrying on of the business itself, coupled with the imposition of a penalty on the corporation or its servants, for the non-payment of the required tax.

Home Ins. Co. vs. City, &c., 93 U. S., 116,123.
License Tax Cases, 5 Wal., 284.
State Tax R'way Gross Receipts, 15 Wal., 284.
Osborne vs. Mobile, 16 Wal. R., 479.
Telegraph Co. vs. Texas, 105 U. S., 460, 464, 466.

But we contend that in viewof the legislation of Congress on this subject, and the right directly conferred by such legislation on the Telegraph Company, to pursue the occupation and do the business of inter-state telegraphy, subject only to the conditions of the act itself; a State cannot legally impose a license or privilege tax, such as that demanded by the Port of Mobile.

The absence of power in the State to exact a license tax in this case arises from the status of the Telegraph Company as an instrument of inter-state commerce, and as a governmental and postal agency in the dissemination of information, the promulgation of orders and transmission of intelligence, expressly recognized and empowered to do business, under and by virtue of the act of Congress, July 24, 1866.

Congress having the sole power as to the regulation of inter-state commerce, has said that it is lawful for the Telegraph Company to do the business of telegraphy in this State, on compliance with certain conditions. Yet the license tax law says, in effect, that the very same business is illegal unless certain other conditions are first complied with, viz: the prior payment of a fixed sum of money to a municipality. While under existing statutes the amount is small, yet if we admit the *power* to place this light obstruction in the way of a legalized business, we can have no way of limiting the Legislature, and a future exercise of the power might seriously hinder or destroy this branch of commerce altogether.

Brown vs. Maryland, 12 Wheat., 419, 439.

In the case of the Pensacola Telegraph Company vs. the Western Union Telegraph Company, 6 Otto, p. 1, the Supreme Court of the United States say, in speaking of the act of 1866, supra, that "so far as it declares that the erection of telegraph "lines shall, as against State interference, be free to all who "accept its terms and conditions, and that a Telegraph Com- "pany of one State shall not, after accepting them, be excluded "by another State from prosecuting its business within her "jurisdiction, is (1) a legitimate regulation of commercial inter-

"course among the States, and (2) IS APPROPRIATE LEGISLA-"TION TO EXECUTE THE POWERS OF CONGRESS OVER THE POSTAL "SERVICE; and it is not only the right but the duty of Congress "to take care that intercourse among the States, and *the "transmission of intelligence* are not obstructed or unneces-"sarily encumbered by State legislation."

In the case of State Tax on Railway Gross Receipts, 15 Wal., 284, the court say on p. 293, after maintaining the tax on the gross receipts of a railroad, *created by the State levying the tax*: "But, on the other hand, the rightful powers of the "National Government must be defended against invasion "from any quarter, and if it be as we have seen, that a tax on "goods or commodities transported into or out of a State, or "*a tax upon the owner of such goods for the right thus to "transport them*, is a regulation of inter-state commerce, such "as is exclusively within the province of Congress, it is inhibited "by the Constitution."

In sustaining this tax on the gross receipts of a domestic railroad, *as the fruits of transportation, and after they have become mingled with the general property of the company*, the court expressly declares, p. 295, that a tax upon inter-state transportation is invalid; and lays stress upon the fact that in the case of gross receipts the tax is not demanded or collected before it is earned, or before the business is done, the thing taxed not being the business itself, but the fruits of the business after the business has been performed.

In Brown vs. Maryland, 12 Wheaton, 419 (448 and 449), Chief Justice Marshall, in speaking of the application of a license tax like the one here under consideration, on importers of goods, says: "Any charge on the introduction and incor-"poration of the articles into the mass of property of the coun-"try, must be hostile to the power given to Congress to regu-"late commerce, since an essential part of that regulation and "the principal object of it, is to prescribe the regular means for "accomplishing that introduction and incorporation," * *

and, again, when it was urged that such a prohibition would abridge the power of the States to tax their own citizens, said: "We admit the power to be sacred, but cannot admit that it "may be used so as to obstruct the free course of a power "given to Congress. We cannot admit that it may be used so "as to obstruct or defeat the power to regulate commerce. "* * *. The taxing power of the States must have some "limits. It cannot reach and restrain the action of the Na- "tional Government within its proper sphere * * * * "*nor the operation* of any law which Congress may constitu- "tionally pass."

In Hall vs. DeCuir, 95 U. S., p. 485 (488), Chief Justice Waite says: "The States regulate as a matter of domestic con- "cern the instruments of commerce, *situated wholly within* "*their own jurisdictions*, and over which they have exclusive "governmental control, *except when employed in foreign or* "*inter-state commerce*, as they can only be used in the State, "their regulations for all purposes may properly be assumed by "the State, *until Congress acts in reference to their foreign or* "*inter-state relations*." If it be true that there is an exception to the right of the State to regulate where such instrument of commerce lie wholly within a State, how much the more is it true where the property itself extends throughout the United States and into the Canadas and other foreign States. Again, the Chief Justice says in the same case, p. 488: "We think it "may safely be said that State legislation which seeks to im- "pose a direct burden upon inter-state commerce or to inter- "fere directly with its freedom does encroach upon the exclusive "power of Congress." See also the opinion of Mr. Justice Clif- ford in the same case, p. 469.

In the License Tax Cases, 5 Wal., 462, which involved the right of a licensee, who, under the act of Congress, was licensed to carry on an ordinary business within the limits of the State, to carry on such business by virtue of his license and notwith- standing the statutes of the States prohibiting or restricting

the business, the court, by Chief Justice Chase, in subordinating the licensed occupation to State law, is careful to confine the operation of its ruling to the internal trade of a State, and say, p. 470, that "it is not doubted that where Congress possesses "constitutional power to regulate trade *or intercourse*, it may "regulate by means of licenses as well as in other modes; and "in case of such regulation *a license will give to the licensee au-* "*thority to do whatever is authorized by its terms.*

"Thus Congress having power to regulate commerce with "foreign nations and among the several States and with the "Indian tribes, may, without doubt, provide for granting coast- "ing licenses, licenses to pilots, licenses to trade with the In- "dians, and any other licenses necessary or proper for the exer- "cise of that great and extensive power of Congress, to the ex- "ercise of which the granting of licenses may be incident. *All* "*such licenses confer authority and give rights to the licensee.*"

So, in the case of Osborne vs. Mobile, 16 Wal. R., 479. In sustaining a license tax similar in all respects to the one in question, and which was demanded from the Southern Express Company, a corporation of Georgia doing business in Mobile and engaged in inter-state commerce, the court was careful to say, p. 482, that "it is to be observed that *Congress has never* "*undertaken to exercise this power in any manner inconsistent* "*with the municipal ordinance under consideration*, and there "are several cases in which the court has asserted the right of "the State to legislate, *in the absence of legislation by Con-* "*gress*, upon subjects over which the Constitution has clothed "that body with legislative authority."

See, also, Randolph vs. Joseph, 71 Ala., 499.

The next case which we should consider as having an important bearing on this question, is the case of the Telegraph Company vs. Texas, 105 U. S., p. 460. The tax laid by the State of Texas was a specific tax of one cent for each full rate and one-half cent for each night message sent. This tax for each message sent between the States was held to be a direct

tax upon commerce or intercourse itself, as much so as were the State tonnage and import duties and passenger duties, which had long before been held unconstitutional and void. The court in the first part of the opinion in this case, in defining the status which the telegraph bears as an instrument of inter-state commerce, says that it has been decided that "Telegraph "Companies were subject to the regulating power of Congress "in respect to their foreign and inter-state business. A Tele-"graph Company occupies the same relation to commerce as a "carrier of messages that a Railroad Company does as a car-"rier of goods. Both companies are instruments of commerce "and *their business is commerce itself.* * * *

"Congress to facilitate the erection of telegraph lines has "authorized the use of the public domain and the military and "post roads, &c., for this purpose. As a return for this privi-"lege those who avail themselves of it are bound to give the "United States precedence in the use of their lines for public "business at rates to be fixed by the Postmaster General. "*Thus, as to government business, companies of this class be-"come government agencies.*

"The Western Union Telegraph Company having accepted "the restriction and obligations of this provision by Congress "occupies * * * the position of an instrument of "foreign and inter-state commerce, *and of a government agent* "*for the transmission of messages on government business.*"

In the case of Picard vs. Pullman Southern Car Co., 117 U. S., pp. 34, 41 and 46, it is shown that the sleeping cars for which a license tax was exacted were engaged in transporting passengers not only between States but between points within the State of Tennessee. This court said that the tax was a unit for the privilege of the transit of passengers and all its accessories. So, too, the car was equally a vehicle of transit, as if it had been a car owned by the railroad company, and the special conveniences or comforts furnished to the passenger had been furnished by the railroad company itself. "As such vehicle of

"transit, the car, so far as it was engaged in inter-state com-
"merce, was not taxable by the State of Tennessee, because the
"plaintiff had no domicile in Tennessee, and was not subject to
"its jurisdiction for the purpose of taxation; and the cars had
"no *situs* within the State for purposes of taxation; and the
"plaintiff carried on no business within the State in the sense in
"which the carrying on of business in a State is taxable by way
"of license privilege,"

It will be observed in the foregoing case that neither sleeping cars nor railroads had ever been the subject of congressional regulation, and that there was no express license on the part of Congress authorizing business, inter-state or otherwise, within the State of Tennessee or elsewhere.

In the case of Robbins vs. Shelby County Taxing District, 120 U. S., p. 489, the court says (p. 493): "It is also an es-
"tablished principle, as already indicated, that the only way in
"which commerce between the States can be legitimately
"affected by State laws, is when, by virtue of its police power,
"and its jurisdiction over persons and property within its lim-
"its, a State provides for the security of the lives, limbs, health
"and comfort of persons, and the protection of property; or
"when it does those things which may otherwise incidentally
"affect commerce, such as the establishment and regulation of
"highways, canals, railroads, wharves, ferries, and other com-
"mercial facilities; the passage of inspection laws to secure the
"due quality and measure of products and commodities; the
"passage of laws to regulate or restrict the sale of articles
"deemed injurious to the health or morals of the community;
"the imposition of taxes upon persons residing within the State
"or belonging to its population, and upon avocations and em-
"ployments pursued therein, *not directly connected with foreign*
"*or inter-state commerce or with some other employment or*
"*business exercised under authority of the Constitution and*
"*laws of the United States;* and the imposition of taxes upon
"all property within the State, mingled with and forming part

"of the great mass of property therein. * * * * *
"And no regulations can be made directly affecting inter-state
"commerce. Any taxation or regulation of the latter charac-
"ter would be an unauthorized interference with the power giv-
"en to Congress over the subject."

On page 496 the court says: "But it will we said that a
"denial of this power of taxation will interfere with the right of
"the State to tax business pursuits and callings carried on
"within its limits, and its right to require licenses for carrying
"on those which are declared to be privileges. This may be
"true to a certain extent; but only in those cases in which the
"States themselves, as well as individual citizens, are subject to
"the restraints of the higher law of the Constitution."

In the case of the W. U. T. Co. vs. Pendleton, 122 U. S., p. 347, it is held that the statutes of Indiana seeking to regulate the delivery of despatches by messengers to the persons to whom they were addressed was in violation of the statutes of the United States.

The case of Moran vs. City of New Orleans, 112 U. S., p. 69, is particularly in point.

It appears that, by statute of Louisiana, the city of New Orleans was authorized "to levy, impose and collect a license
"upon all persons pursuing any trade, profession or calling,
"and to provide for its collection." and further, that "all
"licenses imposed by the city, and not paid by the 31st day of
"July, shall be seizable after thirty days' publication in the
"official journal, and upon the prayer of the city, through its
"proper representatives, any court of competent jurisdiction
"shall enjoin the said person or persons, so liable to pay a
"license tax, and who shall refuse or neglect to pay the same,
"from continuing to carry on such business or profession until
"he shall have paid the same, and all costs and charges for the
"recovery and enforcement of the claim therefor."

Under this authority the Council of the city of New Orleans passed an ordinance "to establish the rate of licenses for pro-"fessions, callings and other business for the year 1880." By said ordinance the license tax imposed upon every member of a firm or company, every agency, person, or corporation, owning and running tow-boats to the Gulf of Mexico, was five hundred dollars, and upon every member of a firm or company, every agent, firm, or corporation, owning and running tow-boats within the corporate limits, was fifty dollars.

One Joseph Cooper owned two steam-propellers, duly enrolled and licensed at the port of New Orleans under the laws of the United States, to be employed in the coasting trade, and employed them as tow-boats in taking vessels from the sea up the river to New Orleans, and from that port to the gulf, all entirely within the limits of the State of Louisiana. He refused to take out his license, and the city of New Orleans brought its action against him in the State District Court to recover the said license tax, and obtained a judgment in its favor, which on appeal was affirmed by the Supreme Court of the State.

The defense relied on and overruled, was that the ordinance, imposing and regulating the license tax, was a regulation of commerce among the States, and, therefore, contrary to Article 1, Section 8, Part 3, Constitution of the United States, and void. The opinion was given by Mr. Justice Mathews, who held that the case fell directly within the rule of the Supreme Court, as laid down in the case of Sinnot vs. The Commissioners of Pilotage, and Foster vs. Commissioners, &c., 22 Howard, and Gibbons vs. Ogden, 9 Wheaton, 210, 214; Brown vs. Maryland, 12 Wheaton, and the Telegraph Company vs. Texas, 105 U. S., p. 460, and cases there cited, and the license was declared unconstitutional and void. Justice Mathews refers to the Freight Tax cases, 15 Wallace, 232, and the State tax on Railroad gross receipts, 15 Wallace, 284, and the cases of Osborne vs. Mobile, 16 Wallace, 479; The Transportation Company vs. Wheeling, 99 U. S., 273; Morgan vs. Parhan, 16 Wallace,

471; Hays Pacific Mail vs. The Steamship Company, 17 How., 596; and Wiggans Ferry Company vs. East St. Louis, 107 U. S., 365, but distinguishes between those cases and the one under discussion. He says: "But the license fee in the present "case is not a tax upon the boats as property, according to "any valuation. * * It is said, however, to be a tax on "an occupation, and for that reason not a regulation of com- "merce. If it were a tax upon the income derived from the "business, it might be justified by the principle of the decision "in the case of the State Tax on Railway Gross Receipts, 15 "Wall., 284, which shows the distinction between a tax on "transportation and a tax upon its fruits, realized and reduced "to possession, so as to become part of the general capital and "property of the tax payer. But here it is not a tax upon the "profits and income after they have been realized from the "business, *it is a charge explicitly made as the price of the privi-* "*lege* of navigating the Mississippi River between New Orleans "and the Gulf, in the coastwise trade; *as the condition on* "*which the State of Louisiana consents* that the boats of the "plaintiff in error may be employed by him *according to the* "*terms of the license granted under* the *authority of Congress.* "The sole occupation sought to be subjected to the tax *is that of* "*using and enjoying the license of the United States* to employ "these particular vessels in the coasting trade; and *the State* "*thus seeks to burden with an exaction, fixed at its own pleasure* "*the very right to which the plaintiff in error is entitled under,* "*and which he derives from, the Constitution and laws of the* "*United States.* The Louisiana statute declares expressly that "if he refuses or neglects to pay the license tax imposed upon "him, for using his boats in this way, he shall not be permitted "to act under and avail himself of the license granted by the "United States but may be enjoined from so doing by judicial "process. *The conflict between the two authorities is direct* "*and express.* WHAT THE ONE DECLARES MAY BE DONE WITH- "OUT THE TAX, THE OTHER DECLARES SHALL NOT BE DONE EX-

"CEPT UPON PAYMENT OF THE TAX. In such an opposition the "only question is, which is the superior authority? and reduced "to that it furnishes its own answer."

What difference is there in principle between the case of Moran vs. The City of New Orleans, and the case of the Port of Mobile vs. Leloup? In the Moran case, the boats for which license tax was exacted were not engaged in passing between the States, but wholly within the State, the decision being rested upon the fact that they were licensed by authority of the United States law.

See, also, Gloucester Ferry Co. vs. Penn., 114 U. S., p. 196.

In the telegraph case, as in the boat case, the person seeking to enjoy the privileges is directly licensed thereto by the constitutional authority of the United States. Under the act of Congress passed July 24th, 1866, the Western Union Telegraph Company was and is authorized to do its telegraph business in the State of Alabama. This statutory license is in the following terms, viz: "Any telegraph company now or- "ganized, or which hereafter may be organized, under the laws "of any State in this Union, shall have the right to construct, "maintain, and operate lines of telegraph through and over "any portion of the public domain of the United States, and "over and along any of the military or post roads of the Uni- "ted States which have been or may hereafter be declared such "by act of Congress, and over, under, or across the navigable "streams or waters of the United States. The only restriction placed upon the exercise of this right by the act of Congress is found in the act itself, viz: that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams or waters, or interfere with the ordinary travel on such military or post roads, and that the telegraph communications between the several department of the governernment of the United States, and their officers and agents shall, in their transmission over the lines of any of such companies, have priority over all other business and shall be sent at

rates to be annually fixed by the Postmaster General; and that the United States will at any time after the expiration of five years from the date of the passage of this act, for postal, military, or other purposes, have the right to purchase all the telegraph lines, &c., of any or all of said companies at an appraised value; and that before any telegraph company shall exercise any of the powers or privileges conferred by said act, such company shall file their written acceptance with the Postmaster General, of the restrictions and obligations required by said act.

The record in this case shows that the Western Union Telegraph Company is a corporation organized under the laws of New York and is conducting its business only upon what has been declared to be post roads of the United States. See the *Telegraph Company vs. Telegraph Company, 96 U. S., p. 1.* The record further shows that the Western Union Telegraph Company has accepted the provisions and restrictions of the said act of Congress in the manner therein pointed out. In other words, the record shows a complete license from the United States to do the very business in question, within the limits of the Port of Mobile.

The ordinance of the Port of Mobile which is sought to be enforced differs in no essential particular from the ordinance of the City of New Orleans. It is true that the remedies are somewhat different but the effect and result of the two remedies, if enforced, must be essentially the same. The ordinance of the City of New Orleans is enforced by an injunction which stops the business; the ordinance of the Port of Mobile is enforced by fines or imprisonment of the agents of the corporation who shall engage in the business. And thus the agents and agents of the Western Union Telegraph Company can be arrested and fined fifty dollars for each and every day that the said telegraph company undertake to do the business for which they have been licensed by the authority of Federal law. This amounts to a prohibition and effectual destruction of the occupation.

The license, then, being demanded as a prerequisite to the

carrying on of the business of inter-state commerce or intercourse by telegraph, is a regulation of a branch of commerce between the States which has been expressly regulated by Congress,—it is an obstruction, however small comparatively it may be in the present case, to the free exercise of a business authorized by Congress and within the power of the Federal government to establish;—it is a direct interference with the operation of a governmental agency, established or recognized as such, for the dissemination of news, and the performance of public functions in the transmission of the orders and directions of the government, and as an adjunct to the postal system, all of which is wholly under the direction and control of Congress. If the Port of Mobile can exact such license every city, town, and village may be authorized to do the same thing; if the legislature can authorize a license tax of $225.00 they may as well fix it at $1,000 for each municipality, or any greater sum, and so in effect seriously impair if not destroy the usefulness of such established instrument of inter-state commerce, government agency and authorized adjunct of the postal department.

It makes no difference whether this State interference is sought to be justified under the exercise of the police or the taxing power or any other power ordinarily inherent in sovereignty, such State action is violative of the powers delegated to Congress. The States ceases to be sovereign in the exercise of power when such exercise conflicts with the exercise of a power delegated to the Federal Government. As was said by Mr. Justice Miller, in Henderson et al vs. The Mayor, &c., of N. Y., 92 U. S., p. 259 (261): "But, however difficult this may be, it is clear from the "nature of our complex form of government, that, whenever "the statute of a State invades the domain of legislation "which belongs exclusively to the Congress of the United States, "it is void, no matter under what class of powers it may fall, "or how closely allied to powers conceded to belong to the "States."

THE TELEGRAPH AS A POSTAL AND GOVERNMENTAL AGENT:

In the case of the Pensacola Telegraph Company vs. the Western Union Telegraph Company, 6 Otto, p. 1, this court said that the act of July 14, 1866, was not only a legitimate regulation of commercial intercourse among the States, but that the same "is appropriate legislation to execute the powers "of Congress over the postal service." And we might add, that the telegraph is an instrumentality provided by the government for communication between its public officers, and for the dissemination of its public reports not only between the district of Columbia and the various States and Territories of the union, but also between points within the limits of particular States or Territories.

We have shown that a State could not demand a license where the telegraphic business was entirely interstate. It needs no argument to show that a State cannot demand a privilege tax from one who might be employed by the United States in transmitting messages between the officers of the Federal government although such business might be found to consist in the transmission of messages between officers within the limits of a particular State. It would be lawful for the government of the United States to employ such agencies, and no State could place any condition upon the lawful exercise of such business.

And by a parity of reasoning it seems to me that the State is equally restrained from interfering with any agency established by congress for the transmission of intelligence between communitees or individuals, the proper function of a postal system, although the business of such particular agent might be confined in its operations within the limits of such State. The language of the constitution of the United States is that con-

gress has power to establish postoffices and post roads. This power is exclusive in congres, and no State has the right to establish a post office or post road.

Post offices and post roads are established for the purpose of enabling the public and members of that public to communicate with each other. That congress considered that the act of July 14, 1866 was an exercise of this particular constitutional power is evidenced by the fact that the right is conferred on telegraph companies ouly as to post roads and military roads of the United States: roads over which, as to the transmission of intelligence, congress has an exclusive dominion.

It would probably be admitted that the officers or appointees of the Federal government while engaged in the postal service of the government could not be subjected to the payment of a privilege tax for undertaking the duty which their employment enjoined upon them. But it may be contended that when private individuals or corporations undertake for a consideration the business of transmitting intelligence between points wholly within a State the occupation is in no sense the exercise of a governmental function, for the reason, among others, that the government is not the recipient of fees and emoluments which accrue from the performance of such service.

In answer to this I respectfully submit that it is immaterial what system or regulation may be adopted by the government in establishing a postal service, and it is equally immaterial as to whether the government receives the revenues derivable therefrom, it is none the less the government's, that private parties are authorized or licensed to do those things which Congress has the sole right to authorize and license them to do.

Suppose that Congress, in exercising the constitutional power referred to, should have provided that certain common carriers who might comply with the conditions prescribed by law, similar to those imposed upon Telegraph Companies in the

case we are considering, should have the right to do the business of transmitting the mails at a reasonable compensation to be charged by them and collected from the persons who should avail of their services in particular cases. Could it be successfully contended that if such carrier were to comply with the conditions, and would thereupon undertake to do the business in question, that the State could step in and demand as a prerequisite to their engagement in such business, that they should first pay the State and every municipality such license as the State might from time to time exact? would this Court have any hesitation in saying that Congress had the authority to confer the power and that the State had no right to obstruct any of those who undertook the business in its free and untrammeled performance? In other words, could the State, after Congress had conferred the right and declared that it should be lawful, step in and say, that notwithstanding the congressional license the business is unlawful until certain things are done by the licensee in conformity with its unbridled desires. While it is possible that the State might say to the common carrier that it should not engage in the carriage of passengers and freights between points within the State without first paying a license, although carrying the mails of the United States, because Congress has no power over the carriage of passengers and goods entirely within the limits of the State; yet, when it comes to Telegraph Companies, we find that they are not engaged in any business over which Congress has not full and complete control.

The constitutional power which we have invoked is sufficient to cover all that may be done by a telegraph company whether wholly within or partly without the limits of a particular State. The question of establishing a governmental postal telegraph system, that is, one in which the government shall control ~~or~~ AND shall receive all the revenue derived from the conduct of the system, is being agitated in the American Congress. No lawyer doubts the right of the government

to control this peculiar method of transmission of intelligence. It has also been intimated, as a possible feature of such legislation, that instead of the government constructing and owning the telegraph lines, it may contract with the existing telegraph companies for the performance of such service. Supposing such a contract should be made; would the peculiar terms of the contract in any sense affect the question as to whether or not the telegraph postal service was under the control and power of the Federal government and that its establishment was the exercise of constitutional authority? If the terms of the contract providing the manner in which such service was to be performed would not affect the question of the validity of the contract itself, it being all sufficient that the government had undertaken to declare the telegraph to be a postal system, would a contract containing the peculiar provisions of the act of 1866 in any way change the matter? Suppose the Postmaster General, acting under authority, should execute a formal contract which would say to the Western Union Telegraph Company, you shall undertake to transmit all messages which shall be delivered to you by the public or the government; you shall receive for such service so much per message, or so much per word, for all messages transmitted for the government or such compensation as the Postmaster General may from time to time fix; but as to messages sent by individuals you may charge for them reasonable rates, to be collected of the senders, and you shall stipulate in this contract that whenever the government desires to manage the property by its own appointees they may take your plant and pay you a sum to be fixed by arbitrators and cut off your revenue as authorized by this contract, is not this the very contract under which the Western Union Telegraph Company is now conducting its business? Different, it is true, in form from an ordinary contract inter parties, but having all the elements of one, being a grant upon conditions performed and for a valuable consideration. Can any one doubt the power of the govern-

ment to establish a telegraphic postal system between Montgomery and Mobile, Ala.? To place the machinery and the working of it in private hands, and yet have it remain to all legal intents and purposes as a part of the postal system of the United States? If so, by what right can the State of Alabama interfere with the exercise of this business? And yet we respectfully submit that this is exactly what the Federal government has done in its legislation on the subject of Telegraph Companies, and it is with the exercise of Federal power that the license tax laws of Alabama conflict and tend to destroy.

It would seem clear, then, upon principle and authority, that if a license tax is a regulation of, or is a burden upon, or an obstruction to, the free exercise of the business upon which it is imposed, it is violative of the Constitution of the United States when that business is the carrying on of an inter-state commerce or intercourse, as to which Congress has legislated, or is an instrument allied to, or part of, the recognized postal system of the United States.

Respectfully submitted,
GAYLORD B. CLARK,
For plaintiff in error.

APPENDIX A.

CODE OF ALABAMA 1876.

"SEC. 384. *Duty of telegraph officers; of auditor; and "right of agents to pay taxes and retain.*—The President and "Secretary of every Telegraph Company, whose line, or any "part thereof, is in this State, shall annually, in the month of "April, return to the Auditor of the State, under oath, the

"number of miles of telegraph wire in this State belonging to "it, and the value thereof, including poles, batteries, instru- "ments, and the length and value of its line, in each county in "this State; and the auditor of the State shall notify the as- "sessors of the counties through which such line runs, of the "value of such property in their respective counties, and the "agents or managers of the line are authorized to pay the "taxes thereon and retain the same out of any money in their "possession belonging to the company; and if any telegraph "company fails to make such return, the auditor shall proceed "to estimate the same, and add one hundred per cent thereon "as a penalty for the failure to make returns herein required, "and apportion the same to the different counties, as provided "in the case of railroad companies."

"SEC. 386. *Statement of gross receipts of telegraph and "sleeping car companies to be made, and duty of assessor on "failure.*—The agents and managers of telegraph, sleeping or "palace car companies shall, on or before the fifteenth day of "April in each year, make out, under oath, a true and full "statement of the gross receipts of their respective offices for "the preceding year, and deliver the same to the assessor for "the county where they collect any income, and such agents "and managers shall pay the tax thereon to the collector and "retain the amount out of any money in their possession be- "longing to such company; but when any such agent or man- "ager shall fail to make the return herein required, the asses- "sor of the county shall proceed to estimate, upon the best in- "formation he can obtain, the probable amount of the receipts "of such business, and add thereto fifty per cent., and return "the same to the collector in the same manner as other assess- "ments are returned, and no property of such company shall "be exempt from levy and sale for taxes."

"SEC. 360. *Statement of taxable property and when tax "year begins,*—Every person of full age and sound mind, and "every firm, body politic or corporate, shall, when called upon,

"as hereinafter provided, forthwith make a full and true state-
"ment in writing to the assessor in the county in which he or
"she resides, in which shall be truly and distinctly set forth a
"correct description of all real and personal property of which
"he or she is the owner, or holder as guardian, parent, hus-
"band, or trustee, executor, administrator, receiver, account-
"ing officer, partner agent, or factor, and also all moneys, and
"credits owned held, or on deposit anywhere in the State on
"the first day of January preceding the assessment, except as
"herein otherwise prescribed; but all property brought into
"the State since the first of January, and before the assessor
"has completed his assessment, shall be subject to taxation
"the same as if it had been held and owned in this State on the
"first day of January."

"SEC. 362. Listing of property.—Every person required to
"make or deliver such statement, shall set forth under oath, to
"be in every instance administered by the assessor before the
"listing thereof, an account of the property held or owned by
"him or them, whether exempt from taxation or not, as fol-
"lows: * * * * * *

"13.—All other property, real and personal, not otherwise
"specified herein."

"AN ACT

"To incorporate the port of Mobile, and to provide for the
"government thereof.

"SECTION 17. *Be it further enacted.* That in order to de-
"fray the expenses of carrying out the provisions of this act
"said police board is authorized and empowered to levy and
"collect for each year of its existence, upon all real and per-
"sonal property, and all subjects of State taxation within said
"port of Mobile, except the subject enumerated in paragraph
"first of section three hundred and sixty-nine of the Code of
"Alabama, and except the tax levied on polls, a tax not exceed-
"ing six-tenths of one per centum of the value of such property,

"or subject of taxation as assessed for State taxation during "the year preceding that for which said police board may as- "sess and lay the tax above provided for; Provided, That "where the personal property of any person does not exceed "one hundred and fifty dollars, and his real estate does not ex- "ceed two hundred dollars, such property shall be exempt from "taxation under this act.

"SEC. 18. *Be it further enacted*, That the taxable proper- "ty of each tax payer and the subjects of taxation on which he "is taxable, and the amount or value of each item thereof as "valued by the assessor of Mobile County for the preceding "year mentioned in Section 17, shall be ascertained and fixed "by the aforesaid tax assessor's book of such year made by "him under the requirements of Section 375 of the Code of Ala- "bama, and any supplemental assessments that may have "been made by him for such year, all corrected as provided in "section four hundred and thirty of the code of Alabama."

"SEC. 19. *Be it further enacted*, That said police board "shall cause a copy of such tax assessor's books, corrected as "aforesaid for such preceding year, to be made and entered in "a bound book properly prepared for that purpose, but when "the property or subjects have changed owners since said as- "sessments on it were made by said tax assessor, said copy "shall be so corrected as to show its true owner at the com- "mencement of the year for which the tax provided for in this "act is to be laid, and so as to show against whom the tax on "each is laid. If the property has since such assessment been "destroyed, or greatly damaged by fire or other cause, this "also shall be noted with the estimated amount of damage."

"SEC. 29. *Be it further enacted*, That should said police "board require further or other means of collecting the taxes "authorized by this act, it may, by an ordinance, adopt or "substitute for any of the foregoing provisions, the provisions "contained in chapter 2, part 1, title 7, of the Code of Alabama, "or any part of such provisions for the collection of such taxes

"by the tax collector of the Port of Mobile, so far as the same "may be applicable, and shall have the same right to sell prop- "erty and make titles to property sold for taxes as is provided "for collecting State and County taxes, and said police board "in adopting such provisions shall, by the ordinance adopting "the same, declare which of such provisions it adopts, and in "such ordinance it may change the provisions so far as to sub- "stitute its tax collector for that of the State or County tax "collector, and so as to adopt the provisions relating to State "and County taxes, to the collection of the taxes authorized "by this act."

"SEC. 30. *Be it further enacted,* That the said police "board shall, besides the tax heretofore authorized, have the "authority to assess and collect from all persons or corpora- "tions trading or carrying on any business, trade or profession, "by an agent or otherwise, within the limits of said corpora- "tion, a license tax which shall be fixed and declared each year "by an ordinance of said corporation, and the licenses so laid "shall be issued and the amount imposed shall be collected as "may be provided by ordinance of said corporation. * * "Said police board may also by ordinance, impose such fines "and penalties within the limitations named in this act, as "they may deem advisable for the doing of any business, or "the carrying on of any trade, or the practicing of any profes- "sion, by any party who shall fail to take out such license as "may be imposed by said police board under the authority "conferred by this act." Acts 1878-79, p. 392.

APPENDIX B.

CONSTITUTION OF ALABAMA, CODE, PAGE 43.

ARTICLE XI.

§ 1. All taxes levied on property in this State shall be assessed in exact proportion to the value of such property; *Provided, however,* The general assembly may levy a poll-tax, not to exceed one dollar and fifty cents on each poll, which shall

be applied exclusively in aid of the public school fund in the county so paying the same.

§ 4. The general assembly shall not have the power to levy, in any one year, a greater rate of taxation than three-fourths of one per centum on the value of the taxable property within this State.

§ 6. The property of private corporations, associations, and individuals of this State shall forever be taxed at the same rate; *Provided*, This section shall not apply to institutions or enterprises devoted exclusively to religious, educational, or charitable purposes.

§ 7. No city, town, or other municipal corporation, other than provided for in this article, shall levy or collect a larger rate of taxation, in any one year, on the property thereof, than one-half of one per centum of the value of such property, as assessed for State taxation during the preceding year; *Provided*, That for the payment of debts existing at the time of the ratification of this Constitution, and the interest thereon, an additional rate of one per centum may be collected, to be applied exclusively to such indebtedness; *And provided*, This section shall not apply to the city of Mobile, which city may, until the first day of January, one thousand eight hundred and seventy-nine, levy a tax not to exceed the rate of one per centum, and from and after that time a tax not to exceed the rate of three-fourths of one per centum, to pay the expenses of the city government, and may also, until the first day of January, one thousand eight hundred and seventy-nine, levy a tax not to exceed the rate of one per centum, and from and after that time, a tax not to exceed the rate of three-fourths of one per centum, to pay the existing indebtedness of said city, and the interest thereon.

APPENDIX C.

REVISED STATUTES OF UNITED STATES.

SEC. 5263. Any Telegraph Company now organized, or

which may hereafter be organized, under the laws of any State, shall have the right to construct, maintain, and operate lines or telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads.

SEC. 5264. Any Telegraph Company organized under the laws of any State shall have the right to take and use from the public lands through which its lines of telegraph may pass, the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of its lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to preemption through which their lines of telegraph may be located as may be necessary for their stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

SEC. 5265. The rights and privileges granted under the provisions of the act of July 24, 1866, entitled "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military and other purposes," or under this title, shall not be transferred by any company acting thereunder to any other corporation, association, or person.

SEC. 5266. Telegrams between the several departments of the government and their officers and agents, in their transmission over the lines of any Telegraph Company to which has been given the right of way, timber, or station lands from the public domain shall have priority over all other business, at such rates as the Postmaster General shall annually fix. And no part of any appropriation for the several departments of

the government shall be paid to any company which neglects or refuses to transmit such telegrams in accordance with the provisions of this section.

SEC. 5267. The United States may, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all companies acting under provisions of the act of July 24, 1866, entitled "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes," or under this title, at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster General of the United States, two by the company interested, and one by the four so previously selected.

SEC. 5268. Before any Telegraph Company shall exercise any of the powers or privileges conferred by law such company shall file their written acceptance with the Postmaster General of the restrictions and obligations required by law.

APPENDIX D.

SEC. 5269. Whenever any Telegraph Company, after having filed its written acceptance with the Postmaster General of the restrictions and obligations required by the act approved July 24, 1866, entitled "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes," or by this title, shall, by its agents or employes, refuse or neglect to transmit any such telegraphic communications as are provided for by the aforesaid act, or by this title, or by provisions of section 222, title "THE DEPARTMENT OF WAR," authorizing the Secretary of War to provide for taking meteorological observations at the military stations and other points of the interior of the continent, and for giving notice on the northern lakes and seaboard of the approach and force of storms, such Telegraph Company shall be liable to a penalty of not less than one hundred dollars and not more than one thousand dollars for each

such refusal or neglect. [To be recovered by an action or actions at law in any district court of the United States.]

APPENDIX E.

SEC. 3964. The following are established post roads:

All the waters of the United States, during the time the mail is carried thereon.

All railroads or parts of railroads which are now or hereafter may be in operation.

All canals, during the time the mail is carried thereon.

All plank roads during the time the mail is carried thereon.

The road on which the mail is carried to supply any court house which may be without a mail, and the road on which the mail is carried under contract made by the Postmaster General for extending the line of posts to supply mails to post offices not on any established route, during the tine such mail is carried thereon.

All letter carrier routes established in any city or town for the collection and delivery of mail matters. [See sec. 2476.]